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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of The United States

OCTOBER TERM, 1972

No. 73-167

GRAFF VENDING COMPANY, et al.,

Petitioners,

v.

KENNETH J. HAMPTON,
d/b/a HAMPTON VENDING SUPPLY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

EARL LUNA,
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Attorney for Petitioners.

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Petitioners respectfully request that this Court grant rehearing of its order dated October 9, 1973, which denied certiorari, and that the Court now grant certiorari.

The petition for certiorari previously filed herein presented the following questions:

1. Whether the Court of Appeals, on appeal from a judgment on the merits by the District Court, rightly held that the District Court tried the case on the wrong theory and,

therefore, the Court of Appeals was not bound by the District Court's Findings of Fact.

2. Whether the Court of Appeals properly disregarded the Findings of Fact of the District Court where the Findings were not shown to be clearly erroneous as provided in Rule 52(a), F.R.C.P., 28 U.S.C.A.

3. Whether the Court of Appeals should reverse and remand this cause to the District Court for further consideration of injunctive relief and attorney fees where Respondent admitted, through his attorney, that he had suffered no monetary damages and failed to prove monetary damages.

The Petition for Certiorari did not raise the question of subject matter jurisdiction. An en banc decision has been handed down by the Fifth Circuit since the Petition for Certiorari was filed in this case which bears directly on the question of jurisdiction of the subject matter. In *Littlejohn v. Shell Oil Co.*, CCH, 1973-2 Trade Cases, paragraph 74,645, the en banc decision held requirement that for an action to be maintainable under the Robinson-Patman Act the Plaintiff must demonstrate that the discriminatory sales were "in commerce". That is, at least one of the two transactions, which when compared generate a discrimination, must cross a state line. This decision overruled a prior decision of a panel of the Fifth Circuit, *Littlejohn v. Shell Oil Co.*, 456 F. 2d 225 (5th Cir. 1972), which permitted an exception to the above stated requirement allowing an action on the basis of a discriminator using profits from interstate activities to underwrite losses sustained in driving

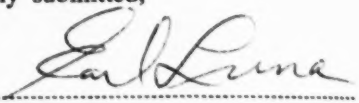
a competitor out of business through local price cutting. It has also been recently held that the requirement to show that at least one transaction violating the Robinson-Patman Act has occurred in interstate commerce is applicable to primary discrimination cases, as well as secondary discrimination cases. *Lucky Breweries, Inc. v. Theo. Hamm Co.*, CCH 1973-72 Trade Cases, paragraph 74,592 (N.D. Cal. 1973). In the instant case, plaintiff presented evidence of sales made by defendants, one in Dallas, Texas, and two in San Antonio, Texas, to support his claim of geographic price discrimination, all three transactions being in intrastate commerce. See pages 21-23 of the Transcript for Hearing on Preliminary Injunction and Plaintiff's Exhibits 1, 2 and 3 offered at that hearing. Hence, Plaintiff has failed to establish that at least one of the offending transactions took place in interstate commerce as required in the *Littlejohn* en banc decision to establish subject matter jurisdiction. Parties cannot waive lack of jurisdiction by failure to raise the issue in lower Courts. *Mitchell v. Maurer*, 293 U.S. 237 (1934). Indeed the Court, whether Trial or Appellate, is obliged to notice want of jurisdiction on its own motion. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951) and *Mansfield, C. & L. M. Ry. v. Swan*, 111 U.S. 379 (1884). Hence, the instant case should be dismissed for lack of jurisdiction due to Plaintiff's failure to properly evidence the required jurisdictional facts.

CONCLUSION

For the reasons set forth in this Petition for Rehearing, as

well as in the Petition for Certiorari previously filed, rehearing of certiorari should now be granted.

Respectfully submitted,



EARL LUNA,
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Dallas, Texas 75201,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

Earl Luna

CERTIFICATE OF SERVICE

THE STATE OF TEXAS)

COUNTY OF DALLAS)

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Petitioners in all proceedings had in the Courts below.

I further state upon oath that on the 31st day of October, A. D. 1973, I served copies of the foregoing Petition for Rehearing on the Respondent, Kenneth J. Hampton, d/b/a Hampton Vending Supply, by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to wit: Mr. James L. Branton, of Carter, Callender, Branton & Gonzalez, Suite 200, 140 Main Plaza, San Antonio, Texas 78205.

Earl Luna

Earl Luna

SUBSCRIBED AND SWORN TO before me by the said EARL LUNA, this the 31st day of October, A. D. 1973.

Notary Public in and for
Dallas County, Texas